

**REDACTED DECISION – DK#S 10-314 PS, 11-034 P, 12-224 P-M – BY – GEORGE V. PIPER, ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION on FEBRUARY 8, 2013 – ISSUED on JULY 29, 2013.**

## **SYNOPSIS**

**TAXATION -- PROCEDURE AND ADMINISTRATION --** It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

**WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF --** In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

**PERSONAL INCOME TAX -- DECLARATION OF ESTIMATED TAX --** In accordance with West Virginia Code Section 11-21-55(a), every resident and nonresident individual on or before the fifteenth day of April of the taxable year should make a declaration of his or her estimated tax for the taxable year if the West Virginia adjusted gross income, other than wages subject to withholding, can reasonably be expected to exceed four hundred dollars plus the sum of West Virginia personal exemptions. *See* W. Va. Code Ann. § 11-21-55(a) (West 2010).

**PERSONAL INCOME TAX -- ESTIMATED TAX PAID IN INSTALLMENTS --** West Virginia Code Section 11-21-56(a) provides that if the declaration is filed the estimated tax shall be paid quarterly and in equal installments with the first installment to be paid at the time of the filing of the declaration. *See* W. Va. Code Ann. § 11-21-56(a) (West 2010).

**PERSONAL INCOME TAX -- EXTENSION OF TIME TO PAY ESTIMATED TAX --** The Tax Commissioner is given authority under West Virginia Code Section 11-21-57(a) to grant an extension of time not to exceed six months for the payment of tax or estimated tax or the filing of a return on such terms and conditions as he may require. *See* W. Va. Code Ann. § 11-21-57(a) (West 2010).

**PERSONAL INCOME TAX -- ADDITIONS TO TAX IMPOSED FOR FAILURE TO PAY ESTIMATED TAX --** Pursuant to West Virginia Code Section 11-10-18a(a), the Tax Commissioner shall add additions to tax in the case of an underpayment of estimated tax under Article twenty-one of Chapter 11 of the West Virginia Code. *See* W. Va. Code Ann. § 11-10-18a(a) (West 2010).

**PERSONAL INCOME TAX -- ADDITIONS TO TAX CONTINGENT PROVISIONS** -- The imposition of the additions to tax under West Virginia Code Section 11-10-18a(a) is contingent upon whether the total amount of the estimated tax payments made during a taxable year equals ninety percent of the tax due on the annual return or an amount equal to one hundred percent of the prior year's tax liability. *See* W. Va. Code Ann. §§ 11-10-18a(b)(1) & 11-10-18a(d)(1) (West 2010).

**PERSONAL INCOME TAX -- WAIVER OF ADDITIONS TO TAX** -- Additions to tax are not to be imposed under subsection (a) of Section 18a with respect to any underpayment if the Tax Commissioner determines that by reason of casualty, disaster or other unusual circumstances the imposition of the additions to tax would be against equity and good conscience. *See* W. Va. Code Ann. § 11-10-18a(e)(3) (West 2010).

**PERSONAL INCOME TAX -- NO GROUNDS SHOWN FOR WAIVER OF ADDITIONS TO TAX** -- Petitioners' repeated failure or refusal to pay the required amount of estimated tax each year when their sources of taxable income did not change and the amounts thereof did not unexpectedly increase from year to year does not constitute failure to do so by reason of casualty, disaster or other unusual circumstances the imposition of which would be against equity and good conscience. *See* W. Va. Code Ann. § 11-10-18a(e)(3) (West 2010).

**PERSONAL INCOME TAX -- BURDEN OF PROOF NOT MET** -- The Petitioners have not met their burden of proof that the denial of the waiver request and/or the assessments issued against them were erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010).

### **FINAL DECISION**

On May 13, 2010, the Internal Auditing Division of the West Virginia State Tax Commissioner's Office, (Tax Commissioner or Respondent) denied Petitioners' request for waiver of the underpayment of estimated tax penalty in the amount of \$\_\_\_\_\_ for tax year 2008. Petitioners timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment on July 29, 2010. *See* W. Va. Code Ann. §§ 11-10A-8(1) and 11-10A-9(a)-(b) (West 2010). As to this matter, Petitioners requested small claim treatment and Respondent agreed to the Petitioners' request.

On November 22, 2010, the Compliance Division of the Respondent issued an assessment against the Petitioners for the underpayment of estimated tax penalty in the amount of \$\_\_\_\_\_ for tax year 2009. Petitioners timely filed a petition for reassessment on January 28, 2011, with this Tribunal. *See* W. Va. Code Ann. §§ 11-10A-8(1) and 11-10A-9(a)-(b) (West 2010).

Finally, on April 20, 2012, the Compliance Division of the Respondent issued an assessment against the Petitioners for the underpayment of estimated tax penalty in the amount of \$\_\_\_\_\_ for tax year 2010. Petitioners again, timely filed their petition for reassessment with this Tribunal on June 8, 2012. *See* W. Va. Code Ann. §§ 11-10A-8(1) and 11-10A-9(a)-(b) (West 2010).

The assessments for 2009 and 2010 as well as the denial of the waiver request for 2008 were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code.

Subsequently, a notice of a video conference evidentiary hearing as to all three petitions was sent to the parties and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10. The parties submitted briefs subsequent to the evidentiary hearing.

During the prehearing conference, which was held telephonically on July 13, 2012, with all parties present, Petitioners were advised that the presiding administrative law judge in these cases is the same administrative law judge assigned to an earlier case (Docket No. 09-029 PS); the ruling from which was adverse to Petitioners. Petitioners did not request that another administrative law judge be assigned with regard to these pending matters.

Petitioners were also informed, during the telephonic prehearing conference, that although that adverse ruling pertained to a small claim case, which is not considered as precedent

in these cases, as per Section 121-110-15 (2003) of the Procedural Rules of the West Virginia Office of Tax Appeals, the fact remains that the law had not changed since the earlier ruling and that the same law applied in the earlier case would be applied to the facts in these cases.

Petitioners were reminded that the legal requirement to prepay either ninety percent of the current year's tax liability or an amount equal to one hundred percent of the prior year's tax liability, in order to comply with the estimated tax statute, remains controlling. Petitioners were also reminded that the earlier ruling revealed that Petitioners' West Virginia adjusted gross income for tax year 2007, as well as for earlier years, had never fluctuated more than a few thousand dollars from year to year.

### **FINDINGS OF FACT**

1. Petitioners are residents of West Virginia City in a West Virginia County.
2. Petitioners' West Virginia taxable income for tax years 2008, 2009 and 2010 was derived from dividends, capital gains, consulting income and taxable social security benefits; the amounts of which did not significantly vary from year to year.
3. Petitioners' West Virginia taxable income for 2008, 2009 and 2010 was in the range of \$\_\_\_\_\_ to \$\_\_\_\_\_ and the taxes paid thereon ranged from \$\_\_\_\_\_ to \$\_\_\_\_\_ per year. Petitioners' annual income tax returns for all three years never showed a balance of tax due at years end. Petitioners received a \$\_\_\_\_\_ refund for tax year 2008; a \$\_\_\_\_\_ refund for tax year 2009 and a \$\_\_\_\_\_ refund for tax year 2010 (State's Exhibits 7, 8 & 9).
4. Petitioners' estimated tax payments made during tax years 2008, 2009 and 2010 did not equal ninety percent of the taxes shown on the annual returns filed for those years nor did Petitioners pay an amount equal to one hundred percent of any of the preceding years' tax liability.

5. On November 1, 2012, Petitioners were notified, by letter from Respondent, that their request for waiver of the estimated tax penalty for tax year 2011 had been accepted; although, that ruling was later rescinded by another letter dated November 29, 2012 as having been issued in error (State's Exhibit 10).<sup>1</sup>

## **DISCUSSION**

The only issue for determination in this matter, is whether the Petitioners have shown that the additions to tax imposed by the Tax Commissioner because of their failure to pay a sufficient amount of estimated tax should now be waived under West Virginia Code Section 11-10-18a(e)(3).

The starting point for this inquiry is West Virginia Code Section 11-21-55(a), which states:

Requirement of declaration. – Every resident and nonresident individual shall make a declaration of his estimated tax for the taxable year, containing such information as the Tax Commissioner may prescribe by regulations or instructions, if his West Virginia adjusted gross income, other than from wages on which tax is withheld under this article, can reasonably be expected to exceed four hundred dollars plus the sum of the West Virginia personal exemptions to which he is entitled.

W. Va. Code Ann. §11-21-55(a) (West 2010).

Petitioners do not dispute that their West Virginia adjusted gross income, other than from wages on which tax is withheld, exceeded four hundred dollars for tax years 2008, 2009 and 2010 and that they were therefore required to pay estimated tax for each of those years.

Once the declaration is made, West Virginia Code Section 11-10-18a(b)(1) requires that the estimated tax due for any taxable year must equal ninety percent of the tax shown on the

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<sup>1</sup> The reason tax year 2011 is being addressed in these proceedings is because Petitioners raised the issue prior to the evidentiary hearing as proof that the Respondent should have waived the additions to tax for all of the tax years prior to 2011.

annual return for that year divided by the number of installments which a taxpayer was required to make for that same year. *See* W. Va. Code Ann. § 11-10-18a(b)(1) (West 2010). An exception is provided for in West Virginia Code Section 11-10-18a(d)(1) in that the additions to tax are not to be imposed if a taxpayer's estimated tax payments made for a taxable year of twelve months equals one hundred percent of the tax shown for the preceding year. *See* W. Va. Code Ann. § 11-10-18a(d)(1) (West 2010).

If a declaration under West Virginia Code Section 11-21-56(a) is filed during the taxable year, the estimated tax should be paid in quarterly installments with the first payment to be made at the time that the declaration is filed. *See* W. Va. Code Ann. § 11-21-56(a) (West 2010).

Petitioners do not dispute that West Virginia Code Section 11-21-56(a) requires that once the declaration is filed the estimated tax should be paid quarterly and in equal installments with the first installment to be paid at the time of the filing of the declaration.

The Petitioners also do not deny that the estimated tax which they paid for each of the years in question did not equal ninety percent of the tax reflected on the annual returns when divided by the number of installment payments which they were required to make, nor do they take issue with the fact that they did not make estimated tax payments equal to one hundred percent of the tax shown for any of the preceding tax years.

West Virginia Code Section 11-10-18a(a) requires the Tax Commissioner to add additions to tax in every case of underpayment of estimated tax. *See* W. Va. Code Ann. § 11-10-18a(a) (West 2010).

Petitioners do not take dispute that West Virginia Code Section 11-10-18a(a), requires the Tax Commissioner to impose additions to tax in cases where there is an underpayment of estimated tax, under Article twenty-one, of Chapter Eleven of the West Virginia Code.

Finally, Petitioners do not question the fact that West Virginia Code Section 11-21-57(a) allows the Tax Commissioner to grant a six month extension of time for the payment of tax or estimated tax or the filing of a return under terms and conditions as he may require. *See* W. Va. Code Ann. § 11-21-57(a) (West 2010).

Notwithstanding all of the concessions and admissions made by Petitioners, they argue that they have an absolute defense to the imposition of the additions to tax because West Virginia Code Section 11-10-18a(e)(3) states as follows:

Waiver in certain cases – No addition to tax shall be imposed under subsection (a) of this section with request to any underpayment if and to the extent the Tax Commissioner determines that by reason of casualty, disaster or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience.

W. Va. Code Ann. § 11-10-18a(e)(3) (West 2010).

Consequently, they posit that in 2008, 2009 and 2010 because of the unforeseeable and unusual financial circumstances which occurred each and every year they were never able to determine their tax liability early enough to compute the correct amount of estimated tax to be paid to avoid the statutorily imposed additions to tax.

The problem with the Petitioners' argument is that there are simply no unusual circumstances presented here, so that imposition of the additions to tax would be against equity and good conscience. In fact, the opposite is true. Although Petitioners speak of not knowing their sources of income and when those amounts would be paid; the amount of capital gains to be reported; when consulting work would take place and in what amount or what amount of social security benefits would be taxable, the fact remains that the sources of their income did not vary, nor did any of the amounts significantly or unexpectedly increase from year to year (Petitioners' Exhibit 1). State's Exhibit's 7, 8 and 9 clearly show that Petitioners' West Virginia taxable

income for all three years remained in the range of \$\_\_\_\_\_ to \$\_\_\_\_\_ and that the taxes they paid, thereon, were only between \$\_\_\_\_\_ and \$\_\_\_\_\_ per year. Moreover, Petitioners' annual tax returns, which they filed for all three years, never showed a balance of tax due at years end, but rather they received nominal refunds of between \$\_\_\_\_\_ and \$\_\_\_\_\_ per year.<sup>2</sup>

Consequently, the Petitioners never presented any credible evidence whatsoever about any unexpected sources or amounts of income for any of the tax years in question. Petitioners merely engaged in conjecture as to what could happen, not what did happen. Again, the proof lies in the fact that their taxable income only fluctuated a few thousand dollars from year to year and their tax returns never showed any amount of tax due at years end.

It should be noted that the Petitioners received this Tribunal's ruling in their 2007 tax year case, before they filed their 2008 returns. Once they had that decision in hand (and knowledge of the law), then, for tax years 2008, 2009 and 2010 they could have paid 100% of the preceding years' tax liability, or followed the 90% rule. Either scenario would have avoided the additions that form the basis of this matter. Petitioners could also have requested an extension of time to file their quarterly returns each year under West Virginia Code Section 11-21-57(a) if they ever had an inkling that their taxable income for any such period might dramatically increase, although it never did.

Quite simply, Petitioners have repeatedly failed or refused to comply with an estimated tax statute; the provisions of which were made known to them prior to the filing of their 2008, 2009 and 2010 tax returns. Accordingly, Petitioners' repeated failure or refusal to pay the required amount of estimated tax each year when their sources of income did not vary and the

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<sup>2</sup> The fact that Petitioners received minimal tax refunds each year all under \$10.00 indicates to this Tribunal that Petitioners were engaged in tax planning during the three years in question so that no amount of tax would be due and owing at years end.



amounts thereof did not unexpectedly increase from year to year does not constitute failure to do so by reason of casualty, disaster or other unusual circumstances so that the imposition of which would be against equity and good conscience.

Therefore, it is determined that Petitioners did not meet their burden of proof for the waiver of additions to tax pursuant to West Virginia Code Section 11-10-18(e)(3).

### **CONCLUSIONS OF LAW**

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

3. In accordance with West Virginia Code Section 11-21-55(a), every resident and nonresident individual on or before the fifteenth day of April of the taxable year should make a declaration of his or her estimated tax for the taxable year if the West Virginia adjusted gross income, other than wages subject to withholding, can reasonably be expected to exceed four hundred dollars plus the sum of West Virginia personal exemptions. *See* W. Va. Code Ann. § 11-21-55(a) (West 2010).

4. West Virginia Code Section 11-21-56(a) provides that if the declaration is filed the estimated tax shall be paid quarterly and in equal installments with the first installment to be paid at the time of the filing of the declaration. *See* W. Va. Code Ann. § 11-21-56(a) (West 2010).

5. The Tax Commissioner is given authority under West Virginia Code Section 11-21-57(a) to grant an extension of time not to exceed six months for the payment of tax or estimated tax or the filing of a return on such terms and conditions as he may require. *See W. Va. Code Ann. § 11-21-57(a)* (West 2010).

6. Pursuant to West Virginia Code Section 11-10-18a(a), the Tax Commissioner shall add additions to tax in the case of an underpayment of estimated tax under Article twenty-one of Chapter 11 of the West Virginia Code. *See W. Va. Code Ann. § 11-10-18a(a)* (West 2010).

7. The imposition of the additions to tax under West Virginia Code Section 11-10-18a(a) is contingent upon whether the total amount of the estimated tax payments made during a taxable year equal ninety percent of the tax due on the annual return or an amount equal to one hundred percent of the prior years' tax liability. *See W. Va. Code Ann. §§ 11-10-18a(b)(1) & 11-10-18a(d)(1)* (West 2010).

8. Additions to tax are not to be imposed under subsection (a) of Section 18a with respect to any underpayment if the Tax Commissioner determines that by reason of casualty, disaster or other unusual circumstances the imposition of the additions to tax would be against equity and good conscience. *See W. Va. Code Ann. § 11-10-18a(e)(3)* (West 2010).

9. Petitioners' repeated failure or refusal to pay the required amount of estimated tax each year when their sources of taxable income did not change and the amounts thereof did not unexpectedly increase from year to year does not constitute failure to do so by reason of casualty, disaster or other unusual circumstances the imposition of which would be against equity and good conscience. *See W. Va. Code Ann. § 11-10-18a(e)(3)* (West 2010).

10. The Petitioners have not met their burden of proof that the denial of the waiver request and/or the assessments issued against them were erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010).

### **DISPOSITION**

Wherefore, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the denial of the waiver of the underpayment of estimated tax penalty against the Petitioners in the amount of \$\_\_\_\_\_ for tax year 2008 is hereby **AFFIRMED**.

This ruling is not subject to any judicial review because this matter is a small claim case.

It is also the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioners for underpayment of estimated tax penalty in the amount of \$\_\_\_\_\_ for the tax year 2009 is hereby **AFFIRMED**.

It is also the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioners for underpayment of estimated tax penalty in the amount of \$\_\_\_\_\_ for the tax year 2010 is hereby **AFFIRMED**.

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
George V. Piper  
Administrative Law Judge

\_\_\_\_\_  
Date Entered